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No. 00-1192

In the Supreme Court of the United States

FRANK SMITH AND CONNIE TYREE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

JONATHAN L. MARCUS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's denial of petitioners' motion to dismiss for selective prosecution.

2. Whether the court of appeals erred in affirming the district court's instructions on 42 U.S.C. 1973i(c) and (e), which did not treat lack of voter consent or knowledge as an element of those offenses.

3. Whether the court of appeals erred in affirming the district court's decision to assign petitioners a base offense level of 12 pursuant to United States Sentencing Guidelines § 2H2.1(a)(2).

4. Whether the court of appeals erred in affirming the district court's decision to exclude the prior testimony of a defense witness pursuant to Federal Rule of Evidence 804(b)(1).

5. Whether the court of appeals erred in affirming the district court's decision to admit certain evidence consisting of absentee ballot affidavits.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 231 F.3d 800.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2000. The petition for a writ of certiorari was filed on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioners were convicted on one count of conspiracy to vote more than once and to give false information to establish voters' eligibility to vote, in violation of 18 U.S.C. 371 (Count 1), and one

count of voting more than once in a federal election, in violation of 42 U.S.C. 1973i(e) (Count 2). Petitioner Smith was also convicted on two counts of giving false information on applications for absentee ballots, in violation of 42 U.S.C. 1973i(c) (Counts 8 and 10), and three counts of giving false information on affidavits of absentee voters, in violation of 42 U.S.C. 1973i(c) (Counts 6, 9, and 11). Petitioner Tyree was also convicted on three counts of giving false information on applications for absentee ballots, in violation of 42 U.S.C. 1973i(c) (Counts 3, 5, and 12), and six counts of giving false information on affidavits of absentee voters, in violation of 42 U.S.C. 1973i(c) (Counts 4, 6, 7, 9, 11, and 13). Petitioners were sentenced to concurrent terms of 33 months' imprisonment, to be followed by two years' supervised release. Pet. App. 6. The court of appeals affirmed on all but one count. *Id.* at 38.[1]

1. This case stems from absentee voting abuses that were committed during the November 8, 1994, general election in Greene County, Alabama. The general election included candidates for the office of the United States House of Representatives—triggering federal voting laws—as well as candidates for various state and local offices. Smith was a candidate in the November 8, 1994, general election for Greene County Commissioner. Tyree was Greene County Deputy Registrar during the election period; she worked with the Greene County Commission and supported Smith's candidacy for commissioner. Gov't C.A. Br. 6; Pet. App. 36.

On the evening before the November 8, 1994, general election, Tyree picked up Cora Stewart and brought

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[1] The court reversed Tyree's Section 1973i(c) conviction on Count 12 for insufficient evidence. Pet. App. 22-24.

her to an activity center to witness absentee ballots. Stewart saw Smith at the activity center and noticed that Smith had a lot of absentee ballots with him in a black briefcase. Smith told Stewart to help Tyree sign absentee ballots. Stewart and Tyree signed as witnesses to numerous absentee ballot affidavits. No voters were present that night and Stewart did not see any voter sign the affidavits. Stewart signed as a witness to approximately 95 affidavits of absentee voter; Tyree's signature appeared as a witness on 166 absentee ballots, more often than any other person's signature. More than 1400 absentee ballots were cast in the November 8, 1994, general election, and approximately 1000 of those ballots were contained in envelopes postmarked November 8, 1994, and received by the circuit clerk of Greene County after 5 p.m. that day. Gov't C.A. Br. 6-8, 20-22; Pet. App. 43.

The evidence further showed that Smith and Tyree committed the following acts, in violation of 42 U.S.C. 1973i(c) and 42 U.S.C. 1973i(e)[2]:

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[2] Section 1973i(c) provides that

> Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District

- Tyree filled out an application for absentee ballot dated November 1, 1994, in the name of Angela Hill, and provided false information about Hill's date of birth. Tyree completed an affidavit for absentee voter postmarked November 8, 1994, forged Hill's signature on the affidavit, and provided faise information about Hill's date of birth and address. Hill did not apply for an absentee ballot, did not vote by absentee ballot, and did not give Tyree permission to cast a vote on her behalf. Gov't C.A. Br. 9-10.

- Tyree filled out an application for absentee ballot dated October 28, 1994, in the name of Eddie Gilmore, providing a false address. Tyree forged Gilmore's signature on an affidavit for absentee voter, and Smith provided false information about Gilmore's address on the affidavit. Gilmore, who had never voted, did not permit anyone to complete the application for absentee ballot and did not know that an application for absentee ballot or affidavit of absentee voter was sent in his name. Gov't C.A. Br. 11.

- Tyree completed many portions of Sam Powell's Alabama Voter Registration Application, in-

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of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

42 U.S.C. 1973i(c).

Section 1973i(e) provides in relevant part that

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

42 U.S.C. 1973i(e). Paragraph (2) of Section 1973i(e) contains the same jurisdictional restriction as Section 1973i(c).

cluding his name, address, place of birth, and date of birth. Tyree signed the application as deputy registrar. Tyree also forged his signature on an application for absentee ballot filed with the circuit clerk on April 28, 1994. Tyree provided a false address for Powell on an affidavit for absentee ballot postmarked November 8, 1994, and falsely attested on the affidavit to witnessing the execution of his oath. Powell, who has never voted in his life, did not give Tyree permission to register him to vote and was not involved in filling out the registration application, nor did he apply for an absentee ballot or fill out an affidavit of absentee voter. Gov't C.A. Br. 12-13.

- Tyree provided a false return address on Cassandra Carter's absentee ballot affidavit and falsely attested to witnessing the execution of her oath. Smith provided a false address on Cassandra Carter's ballot affidavit and forged her name on the ballot application dated October 26, 1994, which he filled out. Cassandra Carter has never voted by absentee ballot, and she gave no one permission to do so on her behalf. Gov't C.A. Br. 16-17.

- Tyree provided a false return address on Willie C. Carter Jr.'s absentee ballot affidavit postmarked November 8, 1994, and falsely attested to witnessing the execution of his oath. Smith provided a false address on Willie Carter's ballot affidavit, and filled out Willie Carter's ballot application dated October 26, 1994, forging his signature. Willie Carter has never voted by ab-

sentee ballot and never gave anyone permission to apply for one or cast one in his name. Gov't C.A. Br. 17-18.

- Tyree signed Shelton Braggs' name on Braggs' absentee ballot affidavit. Gov't C.A. Br. 19; Pet. App. 25.

2. On January 30, 1997, petitioners were charged in a thirteen-count indictment with violations of federal voting laws. Petitioners moved to dismiss the indictment on the ground that they were being selectively prosecuted on the basis of their race and political affiliation. (Petitioners are black and are members of a political faction called the Alabama New South Coalition. Pet. App. 42-43 (paras. 4-6)). The government opposed that motion and argued that petitioners failed to show that they were entitled to discovery on that claim under the threshold standard established by *United States* v. *Armstrong*, 517 U.S. 456, 470 (1996) (to obtain discovery on a race-based selective prosecution claim, defendant must make "credible showing of different treatment of similarly situated persons" of other races). On June 3, 1997, the magistrate judge ruled that petitioners satisfied that standard and ordered the government to make available to petitioners its memoranda of interviews (known as "FBI 302s") and certain other evidence pertaining to the investigation. The district court affirmed the magistrate judge's discovery order. Gov't C.A. Br. 2-4.

A selective prosecution hearing began on June 27, 1997, and lasted four and a half days. Several witnesses testified. Petitioners presented the testimony of Burnette Hutton, Sam Powell's daughter, who had submitted an affidavit that was attached to petitioners' motion to dismiss. Gov't C.A. Br. 45. Based on

information gathered during its investigation, the government believed that Hutton's affidavit contained false statements. *Id.* at 46. As a result, the government informed the magistrate judge of its belief that Hutton would be committing perjury if her testimony paralleled her affidavit. R. 11-288 to 11-289.

The magistrate judge informed Hutton of her Fifth Amendment privilege against self-incrimination and offered to appoint her an attorney. Hutton responded that she understood her rights and did not need a lawyer, then proceeded to testify. R. 11-291. When the government asked her to provide handwriting samples on cross-examination, however, petitioners' counsel objected, and the magistrate judge appointed an attorney to advise Hutton. After meeting with the attorney, Hutton elected not to testify further. The government sought to continue the cross-examination on the ground that Hutton had waived her Fifth Amendment privilege as to matters addressed in the affidavit, but the magistrate judge disagreed and excused Hutton. Gov't C.A. Br. 47-48; Pet. App. 29.

3. On July 29, 1997, the magistrate judge issued an order recommending that petitioners' motion to dismiss be denied. After "[c]arefully considering the evidence," the magistrate judge ruled that petitioners "failed to establish either that they were selected for prosecution or that the prosecution was motivated by an invidiously-discriminatory intent." Pet. App. 57.

The magistrate judge found that evidence of discriminatory effect was wanting, because, while there was evidence "indicating that other people have engaged in fraudulent absentee-ballot voting activities," Pet. App. 57, petitioners did not show that such individuals would never be prosecuted. As for discriminatory intent, the magistrate judge found that it was

clear that "race was not a motivating factor," in light of the fact that "[a]ll of the other people identified by the [petitioners] are themselves African-American, like [petitioners]." *Id.* at 58. The magistrate judge also found that the evidence failed to show that the prosecution was motivated by petitioners' political affiliation, explaining that "[t]he evidence simply does not establish any pattern that the Government chose * * * to prosecute people because of their membership in the Alabama New South Coalition." *Id.* at 59. The district court adopted the magistrate judge's order denying petitioners' motion to dismiss. *Id.* at 39.

4. Trial took place between September 8, 1997, and September 17, 1997. During the trial, petitioners objected to the admission of a government exhibit consisting of approximately 95 absentee voter affidavits witnessed by Tyree. The district court admitted the exhibit, finding the affidavits relevant to the conspiracy count, which alleged in part that

> [i]t was further a part of the conspiracy that the defendants and their co-conspirators in some instances where a voter's signature was obtained on the affidavit of absentee voter would at a later time cause the affidavit of absentee voter to be completed, including the witnessing of the voter's signature by persons who did not see the voter sign the affidavit, and would cause the absentee ballot to be submitted and voted.

Pet. App. 28. At trial, Cora Stewart reviewed the affidavits and identified the affidavits that she and Tyree witnessed without the voter present. *Ibid.*

During the defense, Tyree called Hutton to testify. When Hutton invoked her Fifth Amendment privilege and refused to testify, petitioner sought to introduce

Hutton's testimony from the selective prosecution hearing. The government objected on the ground that it did not have an opportunity at the hearing to complete Hutton's cross-examination. The district court sustained the government's objection, ruling that Hutton's prior testimony was inadmissible under Federal Rule of Evidence 804(b)(1), because the government did not have a "meaningful opportunity to cross examine" at the hearing. Gov't C.A. Br. 48; Pet. App. 30.

The jury returned verdicts of guilty against petitioners on all counts. Petitioners were sentenced pursuant to United States Sentencing Guidelines (Guidelines) § 2H2.1, which provides that the base offense level for obstructing an election is

> (1) **18**, if the obstruction occurred by use of force or threat of force against person(s) or property; or
>
> (2) **12**, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or
>
> (3) **6**, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

In the presentence report (PSR), the probation officer concluded that petitioners were subject to a base offense level of 12 pursuant to Guidelines § 2H2.1(a)(2), because their conduct involved forgery and deceit. Tyree Revised PSR para. 20(d); Smith Revised PSR para. 20(d). Petitioners objected to that finding, arguing that their conduct was subject to punishment under subsection (a)(3), because the language in that

subsection tracked the language of the statutes under which they were prosecuted. The district court overruled that objection, and sentenced petitioners to concurrent terms of 33 months' imprisonment. Pet. App. 6.

5. The court of appeals affirmed petitioners' convictions and sentences, except with respect to one of the counts against Tyree (which is not at issue here). Pet. App. 1-38.

a. The court affirmed the dismissal of petitioners' motion to dismiss for selective prosecution.[3] The court rejected petitioners' contention that the district court erred by requiring them to offer clear and convincing evidence of selective prosecution, rather than proof by a preponderance of the evidence. Relying on this Court's guidance in *Armstrong*, 517 U.S. at 465, that "[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary,'" the court of appeals reasoned that "[c]lear evidence sounds like more than just a preponderance, and evidence that is clear will be convincing." Pet. App. 11. The court further stated that *Armstrong* requires "the defendant to produce 'clear' evidence or 'clear and convincing' evidence which is the same thing." *Ibid.*

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[3] On appeal, the government maintained its position that petitioners had failed to satisfy even the threshold standard established by this Court for obtaining discovery and a hearing on their selective prosecution claim. Gov't C.A. Br. 25. The court of appeals concluded that that argument was not before it and therefore "consider[ed] all of the evidence in the record." Pet. App. 11 n.4. But the court nevertheless stated that its review of the evidence should not "imply[] that we think the district court properly permitted the extensive inquiry it did based upon the showing the defendants had made." *Ibid.*

Upon a "painstaking review of the record" (Pet. App. 16), the court determined that petitioners failed to carry their evidentiary burden with respect to both prongs of their selective prosecution claim—discriminatory effect and discriminatory intent. The court agreed with petitioners that the magistrate judge erred in relying on the possibility of future prosecutions of similarly situated persons in finding insufficient evidence of any discriminatory effect. But the court nevertheless concluded that petitioners failed to meet their burden in showing that the government had not prosecuted similarly situated persons. *Id.* at 16-20.[4]

The court found that the evidence of race-based selection was insufficient, because the white individuals that petitioners claimed were similarly situated did not engage in the same conduct as petitioners. Pet. App. 16. The evidence of selection based on political affiliation was similarly lacking. Petitioners alleged "that other individuals * * * engaged in activities such as paying people to vote, changing a vote on a ballot, and stealing a ballot out of a mailbox." *Id.* at 17. But, as the court explained, such alleged conduct would constitute different crimes than the crimes committed by petitioners. The court reasoned that it was "neither

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[4] The court defined a "'similarly situated' person for selective prosecution purposes" as follows:

> one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant —so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant.

Pet. App. 15-16.

authorized nor competent to second guess the government on which among the universe of different crimes should be prosecuted." *Ibid.* Moreover, "some of th[e] alleged misconduct by others involved single instances and not the repeated criminal conduct for which the defendants were prosecuted." *Id.* at 17-18.

Upon its "careful review of the record," the court concluded that the other individuals whom petitioners argued should have been prosecution targets, such as "individuals who witnessed a substantial number of absentee ballots," were not similarly situated with petitioners. Pet. App. 18. As the court explained, petitioners failed to "point to statements (much less testimony) from any of th[e] voters whose absentee ballots were witnessed by [the individuals] indicating that those voters themselves did not actually vote their ballots regardless of who witnessed them." *Ibid.* The court noted that there was "some evidence" that certain other "individuals may have committed the same type of crimes as [petitioners]." *Id.* at 18-19. But that evidence did not meet petitioners' burden, because petitioners committed more offenses than the other individuals, and the government could "legitimately place a higher priority on prosecuting someone who commits an offense three, six or seven times, than someone who commits an offense once or twice, especially when the offense is a non-violent one." *Id.* at 20. Moreover, the record did not establish that "the strength of the evidence that others may have committed similar crimes" was similar to the evidence that resulted in the guilty verdicts against petitioners. *Ibid.*

The court further held that petitioners failed to carry their burden with respect to the discriminatory intent prong of their selective prosecution claim, providing "an independently adequate basis for denial of [that claim]."

Pet. App. 21 n.12. Petitioners cited two events—the "decision to bring the case in federal court, instead of state court," and the disallowed peremptory strike of a black juror. *Id.* at 22. The court found not "a shred of evidence" to support petitioners' suggestion that the decision to bring the case in federal court was prompted by a desire to avoid a black jury. *Ibid.* And the court noted that the government provided a race-neutral reason for exercising the peremptory strike (that the juror was dozing off). Although the district court rejected that strike, the court of appeals concluded that "[r]ejection of one peremptory strike is no basis for concluding that the underlying prosecution is motivated by bias." *Ibid.*

b. The court of appeals held that "the district court did not abuse its discretion" in admitting "a government exhibit consisting of approximately ninety-five affidavits of absentee voter that had been witnessed by Tyree." Pet. App. 27-28. The court agreed with the district court that the affidavits were relevant to the conspiracy charge, which alleged that petitioners and others witnessed voters' signatures on absentee ballots without seeing the voter sign the affidavit. *Id.* at 28. In addition, "[a]t trial, Cora Stewart reviewed the affidavits comprising [the exhibit] and identified which of the affidavits she and Tyree had witnessed where she did not see the voter sign his signature." *Ibid.*

c. The court of appeals affirmed the district court's decision to exclude the prior testimony of Burnette Hutton under Federal Rule of Evidence 804(b)(1). The court explained that, "[a]fter reviewing the relevant part of the record," it agreed that the government had not had a "full opportunity to cross-examine" Hutton at the selective prosecution hearing as a result of Hutton's

assertion of her Fifth Amendment privilege against self-incrimination. Pet. App. 30.

d. The court of appeals rejected petitioners' claim that the district court erred in charging the jury with respect to 42 U.S.C. 1973i(c) and (e), insofar as the instructions allowed the jury to convict without finding that "the voters in whose names ballots were submitted did not consent to the ballots being cast." Pet. App. 30. The court held that consent of the voter is not a necessary element of either offense. *Id.* at 30-31.[5] Because the first two counts of the indictment included allegations that petitioners had acted without the knowledge and consent of the voters in whose names they applied for and cast ballots, however, the court "assume[d]" that petitioners "were entitled to have the jury instructed that lack of knowledge and consent were required" for the first two counts. *Id.* at 31-32. But the court concluded that the instructions on Counts 1 and 2 "sufficiently conveyed to the jury that it had to find a lack of consent by the voter." *Id.* at 33.

e. The court of appeals rejected petitioners' challenges to their sentences, "agree[ing] with the district

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[5] During its discussion of the sufficiency of the evidence on Counts 12 and 13, the court explained that "nothing in § 1973i(c) requires that the [false] information be given without the voter's permission." Pet. App. 23. Those Counts charged Tyree with violating Section 1973i(c) by giving false information on an application for absentee ballot (Count 12) and on an affidavit of absentee voter (Count 13) in the name of Shelton Braggs. The court concluded that there was insufficient evidence with respect to Count 12, because the government did not establish that the information Tyree provided on the ballot application was false. The court came to the contrary conclusion with respect to Count 13, because Tyree "gave false information by signing Braggs' name [on the affidavit], because she is not Braggs." *Id.* at 25.

court that the appropriate base offense level was 12, as provided by § 2H2.1(a)(2)." Pet. App. 34. As the court explained, petitioners' crimes "involved the votes of other individuals" and "[t]he language of (a)(2) applies in a case where forgery, fraud, theft, bribery, deceit, or other means are used to effect the vote of another person." *Ibid.* The court rejected petitioners' reliance on subsection (a)(3), explaining that "the language of (a)(3) addresses an individual who acts unlawfully only with respect to his own vote—an individual who accepts payment to vote, gives false information to establish his own eligibility to vote, or votes more than once in his own name." *Ibid.*

ARGUMENT

The court of appeals conducted a "painstaking review of the record" (Pet. App. 16) and concluded that the district court correctly rejected petitioners' selective prosecution claim, as well as the other challenges made by petitioners to their convictions and sentences. The court of appeals' fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioners renew their challenge to the district court's denial of their selective prosecution claim, arguing (Pet. 17-19) that the court of appeals' refusal to apply the preponderance-of-the-evidence standard conflicts with the decisions of this Court and other courts of appeals with respect to equal protection claims. That contention is without merit.

There is no conflict with this Court's decisions. In determining the appropriate standard of proof, the court of appeals specifically followed this Court's teaching in *United States* v. *Armstrong*, 517 U.S. 456 (1996). *Armstrong* considered the threshold showing

that a defendant must make to obtain discovery on a selective prosecution claim. But in resolving that issue, the Court reaffirmed that defendants must meet a "rigorous standard" in proving a selective prosecution claim. *Id.* at 468; *id.* at 463 ("Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one."). "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" *Id.* at 465 (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). The court of appeals expressly recognized and applied that standard in this case. Pet. App. 11.[6]

In explaining the need for the "clear evidence" standard, the Court in *Armstrong* emphasized its reluctance to interfere with core executive functions such as the decision to enforce the Nation's criminal laws. The Court explained that it applies a "presumption of regularity" to prosecutorial decisions in recognition of the Court's limited constitutional role, its relative lack of institutional competence to second-guess executive decisions, and the damage that interference could inflict on law enforcement. 517 U.S. at 464-465. Without disputing that rationale, petitioners state (Pet. 18) that this Court's equal protection cases require only proof "by a preponderance." But none of the cases cited by

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[6] The court of appeals looked for "clear and convincing" evidence of selective prosecution, reasoning that "[c]lear evidence sounds like more than just a preponderance, and evidence that is clear will be convincing." Pet. App. 11. But the court also specifically stated that, under the standard it applied, "clear evidence" and "clear and convincing" evidence are "the same thing." *Ibid.* Petitioners object to the application of any standard of proof beyond a preponderance of the evidence.

petitioners in support of that proposition involved a claim of selective prosecution.[7] While this Court has applied the preponderance standard in other contexts, the Court has made clear that a selective prosecution claim presents unique concerns that require that courts apply a "rigorous standard"—"clear evidence"—in reviewing such claims. *Armstrong*, 517 U.S. at 468.[8]

The "clear evidence" requirement enunciated in *Armstrong* accords with the approach taken by this Court in *McCleskey* v. *Kemp*, 481 U.S. 279 (1987). *McCleskey* involved an equal protection claim that the defendant's death sentence was imposed on account of his race. The Court held that it "would demand exceptionally clear proof" that prosecutors have exercised their discretion to enforce the law on the basis of race.

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[7] Petitioners point (Pet. 18) to *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979) (challenge to state statute affording veterans a preference over nonveterans in hiring decisions for state civil service positions); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (challenge to local government's denial of a rezoning request); and *Washington* v. *Davis*, 426 U.S. 229 (1976) (challenge to recruitment practices for District of Columbia police officers).

[8] In *Armstrong*, 517 U.S. at 465, and *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), this Court also referred to the application of "ordinary equal protection standards." But the Court did so for the particular purpose of establishing the *elements* of a selective prosecution claim—namely, discriminatory purpose and discriminatory effect—and not to establish the standard of proof necessary to establish those elements. See *Armstrong*, 517 U.S. at 465 ("The requirements for a selective-prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.") (internal quotation marks and citation omitted); *Wayte*, 470 U.S. at 608-609.

Id. at 297. In so holding, the Court specifically relied upon "the policy considerations behind a prosecutor's traditionally 'wide discretion.'" *Id.* at 296.

Nor does the court of appeals' decision conflict with the decisions of other circuits. See *United States* v. *Magana*, 127 F.3d 1, 8 (1st Cir. 1997) ("[C]ourts have consistently demanded 'clear evidence'" of selective prosecution claim.) (citing cases). The cases cited by petitioners are not to the contrary. In *United States* v. *Redondo-Lemos*, 955 F.2d 1296, 1302 (9th Cir. 1992), the Ninth Circuit employed the preponderance-of-the-evidence standard in reviewing a selective prosecution claim, but that case was decided before *Armstrong*. *United States* v. *Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996), not only was decided before *Armstrong*, but also involved a *Batson* claim. In *Armstrong*, this Court expressly distinguished *Batson* claims from selective prosecution claims in holding that the latter are subject to more exacting proof requirements. 517 U.S. at 467-468. *Eagleston* v. *Guido*, 41 F.3d 865, 878 (2d Cir. 1994), cert. denied, 516 U.S. 808 (1995), involved a gender discrimination claim and, in any event, did not decide the standard of proof that the plaintiff had to meet in support of that claim. The court of appeals in that case upheld a directed verdict for the defendants on the ground that there was *no* evidence of discriminatory intent.

b. Petitioners challenge (Pet. 19-22) the court of appeals' application of the similarly situated requirement, claiming that the court's approach will make a selective prosecution claim "impossib[le]" (Pet. 21) to prove. That contention lacks merit.

Petitioners misconstrue (Pet. 21) the court of appeals' decision as requiring them to prove that the prose-

cution "would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan," *in addition to* showing the existence of other individuals who "committed the same basic crime in substantially the same manner as the defendant." *Ibid.* (quoting Pet. App. 16). In fact, the court of appeals made clear that proof of the latter *illustrates* the former. See Pet. App. 16-17. The court also stated that petitioners could prevail by showing that the government could prove "that someone else had engaged in the same type of conduct [as petitioners], committing the same crime in that or substantially the same manner." *Id.* at 16. It is not impossible for selective prosecution claimants to meet that burden when prosecutors have in fact singled defendants out on an improper basis, because the defendant can obtain the right to discover information pertaining to the prosecution under the standards articulated in *Armstrong*, 517 U.S. at 468-470.

Petitioners contend (Pet. 21) that this case illustrates the "impossibility" of meeting the similarly situated requirement, because there was evidence of other individuals who had "arguably committed precisely the same offense" with respect to two ballots, and petitioners had only committed violations on three and six ballots, respectively. But, as the court of appeals explained, the number of violations an individual has committed is a relevant factor in determining whether to prosecute a case. Pet. App. 20. Moreover, as the court noted, "we do not know from the record the strength of the evidence that others may have committed similar crimes." *Ibid.* In any event, petitioners were not only accused of a greater number of violations, but they were accused of conspiring with each other and with others. In addition, petitioners were public

figures (Smith was a candidate for office and Tyree was the deputy county registrar). See *United States* v. *Hastings*, 126 F.3d 310, 315 (4th Cir. 1997) ("[T]he increased deterrent effect of prosecution of prominent figures is a legitimate consideration in favor of prosecution."), cert. denied, 523 U.S. 1060 (1998).[9]

In any event, even if petitioners were correct that the court of appeals erred in applying the similarly situated requirement of the discriminatory effect prong, the court also concluded that petitioners failed to establish the requisite discriminatory intent, "which is an independently adequate basis" to reject their selective prosecution claim. Pet. App. 21 n.12. Apart from

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[9] Petitioners suggest (Pet. 21-22) that the decision below conflicts with *United States* v. *Parham*, 16 F.3d 844 (8th Cir. 1994), and *Attorney General of the United States* v. *Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983), insofar as the "[d]iscussion[] of the 'similarly situated' requirement" is concerned. This Court does not grant certiorari to resolve differences in the "[d]iscussion[s]" (Pet. 21) contained in lower court decisions. Cf. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted). In any event, in *Parham*, the court of appeals found that the defendant failed to present even a prima facie showing that similarly situated individuals were not prosecuted, and underscored that the defendant bears a "heavy" burden in establishing selective prosecution. 16 F.3d at 846; see *id.* at 846-847 ("[E]gregious as they are, the acts summarized in the affidavits are not sufficiently similar to the acts of voter fraud for which [defendants] were prosecuted to constitute a prima facie case of selective prosecution."). The selective prosecution claim in *Irish People* also failed. Moreover, the court of appeals in that case reaffirmed that "[i]f, as the district court found, there was no one to whom defendant could be compared in order to resolve the question of selection, then it follows that defendant has failed to make out one of the elements of its case." 684 F.2d at 946; see *id.* at 948 n.118.

challenging the court of appeals' application of the clear evidence standard, see Pet. 17-19, petitioners offer no answer to the court's conclusion that the defendants offered no proof of discriminatory intent by pointing to "the decision to bring the case in federal court, instead of state court," and to the district court's rejection of the government's race-neutral explanation for one peremptory challenge, because the district court "did not agree with the government's observations." Pet. App. 22. Because petitioners' failure to prove discriminatory intent is fatal to their selective prosecution claim, review of the court of appeals' disposition of the discriminatory effect requirement would not assist them.

2. Petitioners challenge (Pet. 22-24) the court of appeals' holding that lack of voter consent is not an element of the 42 U.S.C. 1973i(c) or (e) offense, and claim that that ruling conflicts with the decisions of other circuits. That contention is without merit and does not warrant further review.

With respect to the Section 1973i(e) Counts (Counts 1 and 2), the court of appeals "assumed" for purposes of this case that the government was required to prove lack of consent (because of the way in which the indictment was drafted as to those counts), and concluded that the jury instructions "sufficiently conveyed to the jury that it had to find a lack of consent by the voter." Pet. App. 33. The court of appeals properly concluded that lack of voter consent was not a necessary element of the offense with respect to the other counts. See *id.* at 23, 30-31. But, in any event, even if the government had been required to prove lack of consent, the evidence in this case overwhelmingly established that the victim voters did not consent to having absentee balloting documents filled out and signed for them, or

absentee ballots cast on their behalf. See pp. 3-6, *supra*; Gov't C.A. Br. 36.

The cases cited (Pet. 23) by petitioners do not establish that lack of consent is an element of the Section 1973i(e) offense. In *United States* v. *Salisbury*, 983 F.2d 1369 (6th Cir. 1993), the court of appeals held that Section 1973i(e) was unconstitutionally vague as applied to the conduct of the defendant, who was alleged to have instructed voters how to vote their absentee ballots. *Id.* at 1372-1380. In *United States* v. *Cole*, 41 F.3d 303 (7th Cir. 1994), cert. denied, 516 U.S. 826 (1995), the court of appeals rejected a vagueness challenge to Section 1973i(e) in a case involving evidence that the defendant, who was himself a candidate for office, punched multiple absentee ballots that voters had signed. The court held that ordinary people could conclude that the defendant's conduct violated the law because the defendant was executing his own preferences on the ballots (regardless of whether the voters consented to that arrangement). *Id.* at 308.

The court of appeals correctly held that Section 1973i(c) (charged in Counts 3 through 13) does not require proof of lack of consent. The argument that a defendant's provision of false information to establish another voter's eligibility to vote would be excused if that voter consented to the provision of such false information finds no support in the text of Section 1973i(c), and has not been embraced by any court. *United States* v. *Boards*, 10 F.3d 587 (8th Cir. 1993), cert. denied, 512 U.S. 1205 (1994), is not to the contrary. In that case, the court of appeals simply referred to evidence that the defendant marked a voter's absentee ballot "without authorization" for the purpose of illustrating the sufficiency of the evidence that the defendant violated Section 1973i(c). *Id.* at 590. The court did

not hold that lack of consent is a necessary element of the offense.[10]

3. Petitioners contend (Pet. 25-27) that the court of appeals misapplied Guidelines § 2H2.1 by holding that subsection(a)(2) applied to their conduct, rather than subsection(a)(3). That contention is without merit and, in any event, does not warrant further review. The court of appeals provided a well-reasoned explanation for its interpretation of the Guidelines on this particular issue. Pet. App. 34. No other court of appeals has interpreted the Guidelines in a contrary fashion, and the Sentencing Commission may amend the Guidelines if it believes that such action is necessary. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

4. Tyree contends (Pet. 27-28) that the district court's decision to exclude the prior testimony of

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[10] Petitioner also cites *United States* v. *Gordon*, 817 F.2d 1538 (1987), vacated in part on reh'g, 836 F.2d 1312 (11th Cir.), cert. denied, 487 U.S. 1265 (1988), and *United States* v. *Hogue*, 812 F.2d 1568 (11th Cir. 1987), but neither of those cases held that lack of consent is an element of the offenses petitioners committed. See *Gordon*, 817 F.2d at 1542; Pet. App. 31 n.20 (distinguishing *Hogue*). In any event, this Court will not grant certiorari to resolve an intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioners' reliance on *Jacobs* v. *Seminole County Canvassing Board*, 773 So. 2d 519 (Fla. 2000), is also misplaced. The Florida Supreme Court held there that the record did not support a finding of fraud by a county supervisor who allowed representatives of one political party to add voter identification numbers to absentee ballot applications because the information provided by the voters themselves "was sufficient to establish the qualifications of the applicant." *Id.* at 523. Here, by contrast, petitioners falsified key information, including the names and addresses of voters. *Jacobs* did not turn on the issue of voter consent, and nothing in the decision below suggests that the conduct at issue in *Jacobs* constituted a violation of Section 1973i(c) or Section 1973i(e).

Burnette Hutton pursuant to Federal Rule of Evidence 804(b)(1) violated Tyree's Fifth and Sixth Amendment rights. That contention lacks merit.

As discussed above, at the selective prosecution hearing, the government advised the magistrate judge that Hutton would be committing perjury if she testified in a manner consistent with an earlier affidavit (which the government had determined contained certain false statements). The magistrate judge advised Hutton of her Fifth Amendment privilege against self-incrimination and offered to appoint counsel for her, but Hutton chose to continue her testimony. It was only after the government requested handwriting samples from Hutton in response to her testimony that she had signed a ballot affidavit that Hutton decided to consult with an attorney and then to invoke her Fifth Amendment privilege. In response, the government sought to continue its cross-examination on the ground that Hutton had waived the privilege, but the district court rejected the waiver argument and excused Hutton. See p. 7, *supra*; Pet. App. 29.

The government's request for handwriting samples was entirely proper under the circumstances, given that the government was seeking to impeach Hutton's credibility and had information indicating that she had made other false statements regarding voting assistance. Gov't C.A. Br. 46. Moreover, the government's request in no way "compelled" Hutton to invoke her Fifth Amendment privilege, because that privilege does not protect against the provision of physical evidence such as handwriting samples. See *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967); *United States* v. *Euge*, 444 U.S. 707, 718 (1980); see also, *e.g.*, *Northern Mariana Islands* v. *Bowie*, 236 F.3d 1083, 1094 n.5 (9th Cir. 2001) ("Requests by the prosecution for handwriting and

fingerprint evidence * * * are not prohibited by the Fifth Amendment right against self-incrimination because such evidence is not testimonial in nature.").[11] The court of appeals' fact-bound conclusion that the district court did not err in excluding the Hutton testimony pursuant to Rule 804(b)(1) does not merit further review in this Court.

5. Petitioners argue (Pet. 28-30) that the court of appeals erred in holding that the district court did not abuse its discretion in admitting a government exhibit consisting of absentee voter affidavits that Tyree witnessed. That contention lacks merit. As the court of appeals explained, the affidavits were relevant to the conspiracy charge, which alleged, *inter alia*, that petitioners and their co-conspirators completed affidavits and witnessed voters' signatures without voters being present. Pet. App. 28. In addition, "[a]t trial,

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[11] Moreover, the handwriting request in this case stands in stark contrast to the type of conduct that has been held to improperly interfere with a defendant's ability to present witnesses on her behalf. Compare, *e.g.*, *Webb* v. *Texas*, 409 U.S. 95, 95-98 (1972) (trial judge "effectively drove [the] witness off the stand" when he addressed witness and implied that witness would lie, stated that he would "personally see" that witness be indicted for perjury, and told witness that witness would likely be convicted and face serious additional punishment); *Magouirk* v. *Warden*, 237 F.3d 549, 554-555 (5th Cir. 2001) (defendant waives right to confront witness where defendant procures witness's unavailability by threatening witness and physically attacking him). Here, the government did not "threaten[] to indict [Hutton] for perjury," Pet. 27, but instead simply advised the magistrate judge of its belief that she would perjure herself if she testified consistent with her affidavit, and asked the magistrate judge to warn her of her Fifth Amendment rights. That is not improper or intimidating. See *United States* v. *Davis*, 974 F.2d 182, 188 (D.C. Cir. 1992), cert. denied, 507 U.S. 979 (1993).

Cora Stewart reviewed the affidavits comprising [the exhibit] and identified which of the affidavits she and Tyree had witnessed where she did not see the voter sign his signature." *Ibid.* The cases cited by petitioners are inapposite because they all involved prior acts that were extrinsic to the crime charged. See *United States* v. *Anderson*, 933 F.2d 1261, 1267-1274 (5th Cir. 1991); *United States* v. *Sullivan*, 919 F.2d 1403, 1416 (10th Cir. 1990); *United States* v. *Guerrero*, 650 F.2d 728, 732-736 (5th Cir. 1981); see also *United States* v. *Veltmann*, 6 F.3d 1483, 1497-1499 (11th Cir. 1993); *United States* v. *Dothard*, 666 F.2d 498, 501-505 (11th Cir. 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JONATHAN L. MARCUS
Attorney

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